PP

v.

DATO' RAMLI YUSUFF

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NO: K42(A)-47-2009]
12 MAY 2010

CRIMINAL LAW: *Anti-Corruption Act 1997 - Sections 15(1) - Offence of using position for gratification - Allegation of - Respondent issued direction for police aircraft to be flown in vicinity of lands he had interest - Whether direction was for gratification - Whether respondent had intention to view lands - Whether act of viewing lands involves gratification within meaning of s. 2 Anti-Corruption Act 1997 - Circumstantial evidence - Whether respondent's act wrongful and abuse of power - Whether presumption under s. 15(2) Anti-Corruption Act 1997 established*

The respondent was charged in the Sessions Court under s. 15(1) of the Anti-Corruption Act 1997 ('the Act'). It was alleged by the prosecution that the respondent had abused his public office as director of the Commercial Crimes Department when he issued directions to ASP Mohd Norazlan ('PW73') to fly a police aircraft in the vicinity of land area namely Lot PT 2003110300 and Lot PT 2003110332, Lahad Datu ('the two lands'), in which he had an interest so that he could view the said lands. The trial court inferred that the intention of the respondent was to inspect the coastline, which included Dent Haven, of the east coast of Sabah, with a view to observe the security situation there. The respondent was then acquitted and discharged by the learned Sessions' Court judge. Hence, the prosecution appealed against the said decision. The issue that arose for consideration was whether the act of viewing the two lands involved the element of gratification.

Held (dismissing the appeal):

(1) The abuse of public office or position in the context of s. 15(1) of the Act must mean wrongful use of office or position. In order to constitute an offence under the provision, the abuse of public office or position must be for the purpose of obtaining a gratification. (para 6)

(2) The respondent's act did not fit in any of the definitions of gratification under s. 2 of the Act. Thus, even if it was wrong for the respondent to have directed the aircraft to deviate from its original flight path, it was not for the purpose of obtaining a gratification. The charge against the respondent was therefore baseless as it disclosed no offence known to law. (para 21)

(3) All along in his evidence, PW73 was referring to Dent Haven and not once did he refer to the two lands mentioned in the charge. All he knew was that he was flying in the airspace above Dent Haven. The fact that Dent Haven was located in the vicinity of the two lands and that PW73 was directed to fly in an area near Dent Haven even if true, was not proof that the purpose of flying to Dent Haven was to view the lands. (paras 27 & 33)

(4) There was no direct evidence that the respondent's intention when he gave the direction to PW73 was to view the two lands. The evidence was purely circumstantial. In law, whether the evidence is direct or circumstantial, the degree of proof is the same, *ie*, proof beyond reasonable doubt. The law does not impose a higher burden on the prosecution where they are relying on circumstantial evidence rather than direct evidence. (paras 44 & 45)

(5) The respondent's act of signaling to PW73 to circle the Dent Haven area could not be held against him because that act admits of more than one reasonable inference, particularly in the face of evidence that the respondent did not utter a word when he gave the hand signal. Further, the Commissioner of Police Sabah indicated that the Dent Haven area was a hotbed for terrorist activities, smuggling, piracy and illegal entry into Sabah. The suggestion from the defence that the respondent intended to view a high security area and not to view the lands was not far-fetched. Besides, the fact that the two lands were located somewhere near Dent Haven and that the respondent had a personal interest in them did not *ipso facto* and without more prove that his intention was to view the lands to the exclusion of any other intention. (paras 48 & 49)

(6) To incriminate the respondent, the prosecution must have established a criminal nexus between the respondent's knowledge of the location of the lands and his intention in directing the plane to be diverted to that area. When evidence of intention was itself not free from doubt, the fact that the respondent knew the location of the lands meant nothing more than knowing the location of the lands. (para 52)

(7) The prosecution failed to prove that the respondent gave direction to fly in the vicinity of the lands for the purpose of viewing them. This failure not only meant that the precondition for triggering the presumption under s. 15(2) of the Act had not been met, but, it meant that the prosecution's case had collapsed prematurely. As such, the respondent's act of diverting the plane to Dent Haven was not a wrongful act and therefore not an abuse of power for a gratification within the meaning of s. 15(1) of the Act. (paras 59 & 63)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Thomas Kandadi v. PP [2009] 7 CLJ 561 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 ***(refd)***
Teper v. R [1952] AC 480 ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 2, 15(1), (2)

For the appellant - Ahmad Bache DPP; AG's Chambers
For the respondent - Dato' Seri Muhammad Shafee Abdullah (James Tsai with him); M/s Shafee & Co, M/s Idrus & Tsai, M/s Lim Guan Sing & Co

[Please note that the Anti-Corruption Act 1997 has been repealed by the Malaysian Anti-Corruption Commission Act 2009]

Reported by Kumitha Abdul Majid

JUDGMENT

Abdul Rahman Sebli JC:

The Charge

[1] The respondent was charged in the Sessions Court at Kota Kinabalu with an offence specified in the following amended charge:

> That you on 15th June 2007, at approximately 7.50 a.m., at Unit Udara Polis Pangkalan Sabah, in the District of Tanjung Aru, Kota Kinabalu, in the State of Sabah, as an officer of a public body, to wit, Pesuruhjaya Polis G/5594 attached to Jabatan Siasatan Jenayah Komersial, Bukit Aman, Kuala Lumpur as Director of Commercial Crimes, Bukit Aman, Kuala Lumpur, while being such an officer, used your public office for gratification, to wit, that you issued directions and used airplane facilities belonging to the Polis Diraja Malaysia, model CESSNA CARAVAN CE 208-9M-PSQ, to fly in the vicinity of land areas namely Lot PT 2003110300 and Lot PT 2003110332, situated in Ulu Tungku, Lahad Datu, in order to view the said lands, wherein Syarikat Kinsajaya Sdn Bhd has an interest in the said lands, and you have an interest in Kinsajaya Sdn Bhd, and you have thereby committed an offence under section 15(1) of the Anti Corruption Act 1997 and punishable under section 16 of the same Act.

[2] It is a lengthy indictment but in a nutshell the allegation is that the respondent abused his public office as Director of the Commercial Crimes Department when he issued directions for a police aircraft to be flown in the vicinity of lands in which he had an interest in order to view the lands. He claimed trial to the charge and was acquitted and discharged by the learned Sessions Court Judge at the close of the prosecution case without calling for his defence. This appeal is against the order of acquittal and discharge.

The Offence

[3] Section 15(1) of the Anti-Corruption Act 1997 (the Act) provides as follows:

> (1) Any officer of a public body who uses his office or position for any gratification shall be guilty of an offence.

[4] Section 15(2) further provides:

> (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his position for gratification when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

[5] There are two elements to the offence, namely:

(a) use of office or position by a public officer;

(b) such use of office or position by the public officer was for the purpose of obtaining a gratification.

[6] As I said in *Thomas Kandadi v. PP* [2009] 7 CLJ 561 although s. 15(1) of the Act uses the word "uses" the offence lies in the misuse or abuse of the public office or position. Abuse of public office or position in the context of subsection 15(1) of the Act must mean wrongful use of office or position. Where there is abuse of public office but no gratification is involved no offence under s. 15(1) of the Act is committed. To constitute an offence under the provision the abuse of public office or position must be for the purpose of obtaining a gratification.

[7] The charge against the respondent requires proof of the following:

(1) that the respondent gave the direction to fly in the vicinity of the two lands;

(2) that the respondent had an interest in the two lands;

(3) that the purpose of the direction was for a gratification.

[8] Once requirements (1) and (2) are established requirement (3) is presumed by virtue of s. 15(2) of the Act provided the subject matter of the offence is a gratification.

[9] A whole range of issues were raised by the parties in their respective submissions both in this court (there are 64 grounds of appeal against acquittal) and in the court below but when the wheat is separated from the chaff the issue boils down to the fundamental question of whether the accused's act amounted to an offence and if so whether *mens rea* had been established.

Abuse Of Public Office

[10] The alleged abuse of public office by the respondent was in giving the following direction:

> to fly in the vicinity of land areas namely Lot PT 2003110300 and Lot 2003110332, situated in Ulu Tungku, Lahad Datu, in order to view the said lands.

[11] Before the charge was amended the alleged abuse of office was in directing the aircraft "to fly in order to view land area namely Lot PT 2003110300 and Lot PT 2003110332, situated in Ulu Tungku, Lahad Datu".

[12] The amendment was sought by the prosecution after calling its last witness (PW75) and before closing its case. The defence strenuously objected to the application but after hearing submissions the learned Sessions Court Judge on 29 July 2009 acceded to the application.

[13] To paraphrase the amended charge what the respondent is alleged to have told his subordinate officer was, "Fly the plane in the vicinity of my lands, I want to have a look at them." This is the crime the respondent was alleged to have committed. To bring home the charge the prosecution must show that the act of viewing the lands constitutes an offence under s. 15(1) of the Act. This calls for consideration the question of whether the act of viewing the lands involves the element of "gratification".

Whether Offence Disclosed

[14] The word "gratification" is defined by s. 2 of the Act to mean the following:

> (a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description, whether movable or immovable, or any similar advantage;
>
> (b) any office, dignity, employment, contract of employment or services, and any agreement to give employment or render services in any capacity;
>
> (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
>
> (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
>
> (e) any forbearance to demand any money or money's worth or valuable thing;
>
> (f) any other service or favour of any description, such as protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f);

[15] The definition is all encompassing and as such does not admit of any other meaning. Lest the issue be clouded by the voluminous notes of evidence (2274 pages in all including the exhibits) and the gamut of issues raised by the parties it is important to be absolutely clear on what exactly is the "gratification" that the respondent was alleged to have obtained by directing PW73 to fly the aircraft near Dent Haven. For this purpose it is necessary to identify what the abuse of office was and what the purpose of the abuse was.

[16] The abuse of office and the gratification that the respondent intended to obtain by such abuse of office are encapsulated in the following accusations in the charge:

> to wit, that you issued directions and used airplane facilities belonging to the Polis Diraja Malaysia, model CESSNA CARAVAN CE 208-9M-PSQ, to fly in the vicinity of land areas namely Lot PT 2003110300 and Lot 2003110332, situated in Ulu Tungku, Lahad Datu, in order to view the said lands.

[17] The words in bold represent the factual matrix of the offence charged. Going by the terms of the charge it is clear to me that the alleged abuse of office is the respondent's act of directing the aircraft to be flown in the vicinity of the lands and the benefit of viewing the lands is the alleged "gratification". The learned Deputy Public Prosecutor however contended that the gratification is the use of the aircraft and not the viewing of the lands. The *raison d'etre* is that as a result of the diversion of the aircraft to Dent Haven, there was extra consumption of petrol, usage of aircraft for personal use and extra man hours spent by the pilots at no cost to the respondent.

[18] In other words the offence that the respondent committed was for taking a free plane ride to the Dent Haven area to view the lands. The learned Sessions Court Judge appears to have tagged along with the prosecution on this point as can be seen from the following passage in her judgment:

> In effect, what was being leveled at the accused was that he had used his office or position to obtain the services of the pilots and the aircraft to fly in the vicinity of the lands in order for him to view the lands. I would say herein lays the case for the prosecution on the obtainment of the gratification.

[19] I cannot accede to this line of argument. In the first place the respondent was not charged with using his public office for the purpose of using the aircraft free of charge. The abuse of public office alleged against the respondent is that he directed the aircraft to divert to the vicinity of the lands for the purpose of viewing the lands. The aircraft was merely a means to an end, not an end in itself. It is the ultimate objective of the direction that forms the subject matter of the offence, not the vehicle through which the objective was achieved.

[20] A simple example will illustrate the point. A Commissioner of Police on the way to the office directs his driver to deviate to his farm. Here since deviating to the farm is an offence according to the prosecution, the direction to deviate to the farm constitutes the abuse of office and the visit to the farm the gratification intended by the abuse of office. Therefore the gratification is the visit to the farm and not the use of the car to get to the farm.

[21] The question is whether the respondent's act of viewing the lands is a "gratification" within the meaning of s. 2 of the Act. I must say at the outset that it is not. It is clear to me that the act does not fit in any of the definitions of "gratification" under that section. Thus even if it was wrong for the respondent to have directed the aircraft to deviate from its original flight path it was not for the purpose of obtaining a "gratification". The charge against the respondent was therefore baseless as it disclosed no offence known to law. The respondent ought to have been acquitted on this score alone.

Whether *Prima Facie* Case Established

[22] Assuming I am wrong in holding that the gratification is the act of viewing the lands and not usage of the aircraft the question is whether a *prima facie* case had been established against the respondent at the close of the prosecution case. A *prima facie* case is one where the evidence is sufficient to convict the accused if he were to remain silent when called upon to enter his defence: *Balachandran v. PP* [2005] 1 CLJ 85 FC.

[23] The prosecution relied heavily on the testimony of ASP Mohd Norazlan bin Abdul Razak (PW73) to prove the first element of the charge, namely abuse of public office by the respondent. No other witness heard what the respondent told PW73 to do prior to the flight. It is not an exaggeration to say that his evidence is the pillar of the prosecution's case. The

evidence of the seventy four other witnesses called by the prosecution will count for nothing if the testimony of PW73 is flawed. His evidence must therefore be able to withstand crucial scrutiny.

[24] The crucial parts of PW73's evidence are as follows. On 15 June 2007 he was tasked to commandeer a flight bringing the respondent and his entourage from Kota Kinabalu to Lahad Datu Sabah on official duty and back. Among those in the entourage were two civilians (PW11 and PW13) who were not supposed to be in the flight. PW13 is a co-owner of the two lands in question and a close acquaintance of the respondent.

[25] Shortly before the flight PW73 had met the respondent at the canteen of the Air Unit Base at Tanjung Aru, Kota Kinabalu where they had a conversation. It is the instruction given during the course of this conversation that forms the cause *celebre* of the case for the prosecution. To put the issue in its proper perspective it is necessary to reproduce verbatim the following parts of PW73's QA in examination in chief:

Q: When you met Datuk Ramli at the canteen before the flight did you have any conversation with him?

A: Yes and at that particular time I cannot remember whether Chief Inspector Rahisham was by my side.

PW73: Part of my conversation with Datuk Ramli at the canteen on 15.6.2007 before the flight was with regard the destination. It was about the flight to Lahad Datu and also to do observation in an area near Dent Haven.

That is all I can remember.

Q: Who was it who said about this destination and observation at Dent Haven?

A: Datuk Ramli.

Q: When he said about the destination and observation at Dent Haven was it in connection with this flight you were going to go on?

A: No.

Q: You said Datuk Ramli spoke to you about the destination and observation at Dent Haven was this in connection with the flight you were supposed to take from Kota Kinabalu to Lahad Datu that day?

A: It can be connected. The Director of Commercial crimes would know.

Q: This conversation that Datuk Ramli had with you about this observation at Dent Haven was it in respect with this proposed flight from Kota Kinabalu to Lahad Datu?

A: No.

Q: When you met Datuk Ramli on 15 June you had not started the flight from Kota Kinabalu to Lahad Datu?

A: Correct.

Q: It is a proposed flight and had not taken place. So when you said Datuk Ramli spoke of observation to Dent Haven did it have a relevance to this particular flight?

A: No.

Q: So what connection did this conversation with Datuk Ramli have with the flight to Lahad Datu?

A: Because Dent Haven is a place which is near to Lahad Datu.

Q: But this conversation you had when he said he wanted to do an observation at a place near Dent Haven was it prior to the flight to Lahad Datu from Kota Kinabalu?

A: Yes.

Q: Did he tell you why he wanted to do this observation near Dent Haven?

A: No.

Q: When you made this so called diversion, how did you know the point you were supposed to have made the diversion? Was there any indication from Datuk Ramli to make the diversion then?

A: No.

Q: When you were on board the aircraft with Datuk Ramli together with all the passengers was there any indication while on this route that you were supposed to make the diversion there or was it based on the initial request at the canteen?

A: It was based on the initial request at the canteen.

Q: What happened in the Dent Haven area? A

A: We circled. We circled at the Dent Haven area.

Q: On whose instruction did Chief Inspector Rahisham circled in that area?

B

A: On my instructions.

Q: Why did you ask him to do the circling around the area of Dent Haven?

A: Because I received signal from Dato' to do the circling. C

Q: Which Dato' is this who signalled you to do the circling?

A: Datuk Ramli.

Q: How was this signal given to you to do the circling? D

A: He gave hand signal thus.

Court: Witness demonstrates by making vertical circling motion with his index finger.

[26] What can be discerned from the above evidence is that prior E to the flight the respondent requested PW73 to do an "observation" in an area near Dent Haven without telling him what the purpose of the "observation" was and that when the aircraft reached the airspace above Dent Haven the respondent gave a hand signal to PW73 to circle the area. F

[27] It is immediately apparent from the above excerpts that PW73's evidence is off tangent with what is alleged in the charge. The charge categorically states that the direction by the respondent was to fly "in the vicinity of land areas namely Lot PT 2003110300 and Lot PT 2003110332, situated in Ulu Tungku, Lahad Datu" yet all along in his evidence PW73 was referring to Dent Haven. Not once did he refer to the two lands mentioned in the charge. Is Dent Haven located within sight of the two lands from the air? If it is no such evidence was forthcoming from H PW73. In fact he did not even say where Dent Haven was in relation to Lot PT 2003110300 and Lot PT 2003110332. Perhaps he did not even know. All he knew was that he was flying in the airspace above Dent Haven. G

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[28] At the trial there was literally a shouting match ("bertegang leher" in Malay) between the parties over the question whether what the respondent told PW73 to do was a "request" or a

A "direction". No less a person than the Inspector General of Police himself (PW75) was asked to clarify on this point. With all due respect the quarrel over the terminology is, to borrow Shakespeare much ado about nothing. When a Commissioner of Police who is also the top five highest ranking member of the entire Malaysian
B Police Force tells an Assistant Superintendant of Police to do something that is not patently illegal certainly the Assistant Superintendant of Police will feel bound by discipline to obey it.

[29] There will be chaos and total breakdown in the chain of
C command if a subordinate officer is free to disobey a simple request by his superior officer. The fact that PW73 obeyed what the respondent told him to do is evidence enough that he treated the request as an order. PW73's self proclamation in answer to a question under cross examination that he was in charge and "King
D in the aircraft" must be taken with a pinch of salt.

[30] The finding of the learned Sessions Court Judge was that what the respondent told PW73 to do was a request and not a direction but in my view it does not matter whether it was a
E request or a direction. The fact is, PW73 followed what the respondent asked him to do and the plane did divert to Dent Haven.

The Direction Given To PW73

F **[31]** The question that demands a clear answer is whether PW73 was asked to fly "in the vicinity" of the lands "in order to view the lands". The question is pertinent because that is the crime the respondent is alleged to have committed. In his testimony PW73 merely said that the respondent's instruction was "to do
G observation in an area near Dent Haven." He capped it all by saying "That is all I can remember." He did not say that he was instructed to fly in the vicinity of the two lands, let alone to fly in the area "in order to view the said lands".

H **[32]** PW73's evidence would have assumed a different complexion if the respondent had told him "Fly me to Dent Haven, I want to have a look at my lands located somewhere near that place" or words to that effect. No such evidence came from PW73. His evidence when tested against the charge is vague and casts doubts
I on whether he had indeed been directed to divert the plane to Dent Haven so that the respondent could view the lands.

[33] It is clear that PW73's evidence does not provide proof that the respondent's instruction was to fly "in the vicinity" of the lands "in order to view the lands" as alleged in the charge. If he did fly in the vicinity of the lands it had nothing to do with any instruction given by the respondent. The fact that Dent Haven is located in the vicinity of the two lands and that PW73 was directed to fly "in an area near Dent Haven" even if true is not proof that the purpose of flying to Dent Haven was to view the lands.

[34] In cross examination PW73 was asked if it was possible that the instruction given to him was for him to take the coastal route and his answer was an unequivocal "Yes". The QA is reproduced below:

> Q: Given our memory and also the fact that this is routine matter and also the fact that Datuk Ramli had made request before this, I am instructed by Datuk Ramli that he did make a request to you probably at the canteen but his request to you was to take the coastal route. Could that have been a possibility that happened?
>
> A: Yes.

[35] Now, this evidence establishes that there were two instructions that the respondent could possibly have given to PW73, namely:

(1) to do observation in an area near Dent Haven.

(2) to take the coastal route en route to Lahad Datu.

[36] PW73 went on to testify that when they reached Dent Haven they made an anti-clockwise orbit and the aircraft descended above Dent Haven. He added that "if I am not mistaken" he did alert the respondent for him to view the Dent Haven PGA post.

[37] In re-examination the learned Deputy Public Prosecutor decided to ask PW73 again if Dent Haven was mentioned in his conversation with the respondent at the canteen on 15 June 2007. His answer this time around was "If I am not mistaken it was mentioned." This is quite a turn around from his earlier answer in examination in chief when he said in no uncertain terms that the respondent did mention Dent Haven. It is obvious that PW73 was not even sure if the respondent mentioned Dent Haven prior to the flight.

[38] There is no excuse for a senior police officer like PW73 to falter on such an important matter. Granted that human memory is fallible and that a witness is not expected to remember every detail of a conversation that took place more than a year earlier but to be sure in one breadth and then to be unsure in the next speaks volumes of PW73's reliability as a witness.

[39] It is therefore not surprising that the learned Sessions Court Judge made the following finding with regard to the evidence of PW73:

> The evidence of PW73 being such, he had given 2 inconsistent versions of the terms of the request that the accused had made. The discrepancy was never resolved or explained. In fact, the prosecution was silent and did not make representations on this issue during submissions. As such, I found that the prosecution had failed to clearly establish the exact terms of the request that was made by the accused. Given that the exact request is an element material to the charge and it was not clearly established, on account of this alone, it could be said that this ingredient of the charge was not proved on a *prima facie* basis.

[40] The following QA in the cross examination of PW73 is crucial:

> Q: Datuk Ramli did not make any request "let's go in a bit inside to see some land"?
>
> A: No such request.

[41] The significance of this evidence is that the respondent did not show any particular interest in the land below when the plane was orbiting the Dent Haven area. If indeed his intention was to view the lands as suggested by the prosecution one would expect him to at least get a little excited and speak to PW13 concerning the land below. After all that according to the prosecution was the reason why PW13 was brought along on the trip to Lahad Datu. But all that the prosecution could come up with was evidence that the respondent and PW13 did not even speak to each other upon reaching the area. This lack of interest casts a cloud of doubt on whether the respondent's intention was to view the lands.

Drawing Of Inferences

[42] On the evidence can a valid inference be drawn that the respondent's intention in instructing PW73 to fly near Dent Haven was to view the two lands? The law on the drawing of inferences is settled. In *Liew Kaling & Ors v. PP* [1960] 1 LNS 60 the Malayan Court of Appeal laid down the rule that before an inference can be considered to be a valid one it must comply with two conditions, namely:

(1) it must account for all the known facts; and

(2) it must be the only reasonable inference that will account for all these facts.

[43] In *Tai Chai Keh v. PP* [1948] 1 LNS 122 Spencer Wilkinson J delivering the judgment of the same court held that where there is more than one inference that can reasonably be drawn from a set of facts, the inference most favourable to the accused must be adopted. This principle was reaffirmed by the Federal Court in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

No Direct Evidence Of Intention

[44] There clearly is no direct evidence that the respondent's intention when he gave the direction to PW73 was to view the two lands. The evidence is purely circumstantial. Since the respondent did not tell PW73 what was the purpose of doing the "observation" near Dent Haven what then was the respondent's intention in instructing PW73 to fly near Dent Haven, if indeed he had given the instruction and if indeed the lands are located near Dent Haven? The prosecution's answer is "of course it was to view the two lands". This according to the prosecution was what the respondent had in mind when he told PW73 to fly to Dent Haven.

[45] In law whether the evidence is direct or circumstantial the degree of proof is the same, ie, proof beyond reasonable doubt. The law does not impose a higher burden on the prosecution where they are relying on circumstantial evidence rather than direct evidence. However, as Lord Normand said in *Teper v. R* [1952] AC 480 at p. 489:

> Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another … It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference …

[46] The prosecution is relying on the following strands of circumstantial evidence to prove *men rea* on the part of the respondent:

(1) He directed PW73 to divert the flight to Dent Haven where the two lands were located.

(2) He had a personal interest in the two lands.

(3) He knew the location of the two lands.

(4) He brought a civilian co-owner of the two lands to join him on the trip to Lahad Datu.

(5) At Dent Haven he signalled to PW73 to circle the area.

[47] The following co-existing circumstances however militate against the prosecution:

(1) At the time the respondent gave the instruction to PW73 he made no mention of any land, let alone telling PW73 that he wanted to view the two lands.

(2) Throughout the flight from Kota Kinabalu to Dent Haven there is no evidence of any conversation between the respondent and anyone else in the plane regarding the lands.

(3) When the aircraft reached Dent Haven and PW73 alerted the respondent for him to view the PGA post, there was no sign of any excitement among the passengers who purportedly had interest in the lands, namely PW13 and the respondent himself.

(4) When the respondent gave the circular hand signal at Dent Haven he did not mention anything about any land to PW73 or to anyone else in the plane.

[48] The respondent's act of signalling to PW73 to circle the Dent Haven area cannot be held against him because that act admits of more than one reasonable inference, particularly in the

face of evidence that the respondent did not utter a word when he gave the hand signal. Further, there is evidence from the prosecution own witnesses, including the Commissioner of Police Sabah (PW36) that indicates that the Dent Haven area is a hotbed for terrorist activities, smuggling, piracy and illegal entry into Sabah. Seen in this light the defence suggestion that the respondent intended to view a high security area and not to view the lands is not far fetched.

[49] Against this backdrop, evidence that the respondent directed PW73 to fly to Dent Haven to do observation in the area becomes completely neutral. It may give rise to suspicion that the purpose of the deviation was for the respondent to view his lands but it is settled law that suspicion no matter how grave can never be a substitute for proof. The fact that the two lands were located somewhere near Dent Haven and that the respondent had a personal interest in them does not *ipso facto* and without more prove that his intention was to view the lands to the exclusion of any other intention.

[50] Let us assume for the sake of argument that instead of just asking PW73 to circle the Dent Haven area the respondent had instructed PW73 to land the aircraft on the lands. Would that be conclusive proof that his intention was to inspect the lands to the exclusion of any other intention? I do not think so. Something more than mere interest in the lands is required to prove the respondent's intention, and it must be established by hard evidence and not by mere assumption founded on suspicion.

Location Of Lands

[51] At the trial the prosecution went at great lengths to prove the exact location of the lands, no doubt to show that the respondent knew where the lands were located. The prosecution even went to the extent of adducing GPS evidence and the co-ordinates of the surveyed lands to pin point the exact location of the lands in relation to the PGA Post at Dent Haven. With due respect all these evidence amount to nothing more than proving that the lands were located near the Dent Haven area to the knowledge of the respondent.

[52] To incriminate the respondent the prosecution must establish a criminal *nexus* between the respondent's knowledge of the location of the lands and his intention in directing the plane to be diverted to that area. But when evidence of intention is itself not

A free from doubt the fact that the respondent knew the location of the lands means nothing more than knowing the location of the lands.

[53] It must be emphasized at the risk of repetition that the
B pivotal issue is whether the respondent's intention was to view the lands when he instructed PW73 to fly near Dent Haven. It does not really matter if he knew the location of the lands or otherwise. The aircraft might even have lost its way and wandered away from the two lands but if there is proof that the respondent's
C intention in diverting the plane to the area was to locate the lands in order to view them his criminal design would have been established and the offence would have been committed irrespective of whether he knew the exact location of the lands or otherwise.

D

Presumption Of Purpose

[54] The learned Deputy Public Prosecutor urged upon me that the presumption under s. 15(2) of the Act applies against the respondent and that therefore the burden is on him to prove that
E he was not actuated by corrupt motive when he instructed PW73 to divert the plane to Dent Haven. However he did not explain what is it that the law presumes against the respondent. In the context of the charge the presumption can only be the intention to view the lands because that is the gratification intended by the
F respondent when he gave the direction to PW73.

[55] Section 15(2) presupposes that the purpose of the decision made or the action taken by the accused is "for gratification". If the presumption applies against the respondent the burden on him
G is to prove on the balance of probabilities that the direction that he gave to PW73 was not for the purpose of obtaining any "gratification" as the word is defined in paras (a) to (g) of s. 2 of the Act. Clearly therefore the presumption only comes into play if a "gratification" is involved. If no "gratification" is involved there
H is nothing to rebut.

[56] In the present case what is the "gratification" for the purpose of which the direction was given by the respondent? In my view there is none. As I said earlier in this judgment the
I benefit of viewing the lands is not a gratification within the meaning of s. 2 of the Act. There is therefore nothing for the respondent to rebut.

[57] In any event even assuming that viewing the lands is a gratification the presumption will only apply if the following two conditions are fulfilled: A

(1) that the accused made a decision or took any action in his official capacity; B

(2) that the decision made or the action taken was in relation to any matter in which the accused himself, or any relative or associate of his, had an interest, whether directly or indirectly.

[58] Only when these two conditions are fulfilled can the respondent's act of directing PW73 to divert the plane to Dent Haven be presumed to be for the purpose of a gratification, in this case to view the lands. It is therefore incumbent on the prosecution to establish first and foremost that the respondent did issue the direction to PW73 to fly in the vicinity of the lands for the purpose of viewing the lands. This is a question of fact and the *actus reus* of the offence without which the presumption cannot have any application. C D

[59] On the facts it is clear that the prosecution failed to prove that the respondent did give the direction to fly in the vicinity of the lands for the purpose of viewing them. This failure not only means that the precondition for triggering the presumption had not been met but more importantly it means that the prosecution's case had collapsed prematurely. E F

[60] The presumption under s. 15(2) of the Act like any other statutory presumption is a rebuttable presumption. While the burden is on the accused to rebut the presumption on the balance of probabilities the rebuttal need not be suspended until after his defence has been called. The presumption can be rebutted or neutralized by evidence adduced by the prosecution itself. G

[61] If for instance the circumstances of the case are such that it becomes more probable than not that the purpose of the decision made or the action taken by the accused was not to obtain a gratification then there is very little point in calling for his defence just to hear what he has to say in rebuttal of the presumption. After all the overall burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt and this is not dependent on whether the accused succeeds or fails in discharging his burden of proof. H I

A **Trial Court's Finding**

[62] Having regard to the evidence before her, the principles applicable and the probabilities of the case the learned Sessions Court Judge was therefore entitled to arrive at the following
B penultimate conclusion:

> Thus, one clear inference that was reasonably possible stood out from the facts established. It is this. The intention of the accused in making the request was to inspect the coastline (which included the Dent Haven area and the PGA post) of the east coast of
C Sabah with a view to observing the security situation there. This is a conflicting inference from the one drawn by the prosecution that the intention of the accused in making the request was to view the lands in question. It is trite that where two inferences are reasonably possible, the court is to draw the inference most
D favourable to the accused (see *Balachandran v. PP* [2005] 1 CLJ 85 FC; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[63] This finding effectively means that the respondent's act of diverting the plane to Dent Haven was not a wrongful act and therefore not an abuse of power for a gratification within the
E meaning of s. 15(1) of the Act. The conclusion was arrived at after a painstaking and meticulous evaluation of the entire evidence produced by the prosecution. The rule is clear. The appellate court will only interfere with the decision of the trial court if there has been no or insufficient judicial appreciation of the evidence:
F *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19. This is not the case in this appeal.

Conclusion

[64] For all the above reasons I found no merit in the appeal.
G Accordingly the Public Prosecutor's appeal was dismissed.

H

I